



# BOARD OF INQUIRY (*Human Rights Code*)

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IN THE MATTER OF the Ontario *Human Rights Code*, R.S.O. 1990, c.H.19, as amended;

AND IN THE MATTER OF the complaint by Dena Potocnik dated October 25, 1988, alleging discrimination in employment on the basis of sex.

**B E T W E E N :**

Ontario Human Rights Commission

- and -

Dena Potocnik

Complainant

- and -

City of Thunder Bay

Respondent

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## DECISION

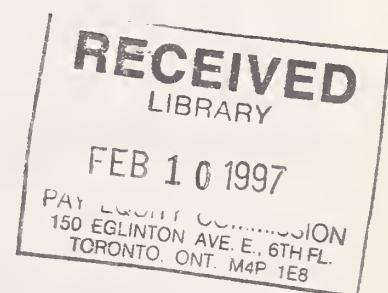
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Adjudicator : Lorne Slotnick

Date : February 7, 1997

Board File No: BI-0034-95

Decision No : 97-004



## A P P E A R A N C E S

Ontario Human Rights Commission	)	Stephen Wojciechowski, Counsel
	)	
Dena Potocnik, Complainant	)	On her own behalf
	)	
City of Thunder Bay, Respondent	)	Allan McKitrick, Counsel
	)	

This complaint was filed in 1988, and alleges that the City of Thunder Bay discriminated against Dena Potocnik on the basis of sex when it denied her the jobs of Treasurer and, subsequently, Deputy Treasurer.

Ms. Potocnik has been employed by the City of Thunder Bay since 1983, and is currently a Management Studies Analyst in the City's municipally operated telephone company. She has a background as a businesswoman and a teacher, and she acquired her designation as a Chartered Accountant in 1983. She also holds a Bachelor of Business Administration. When she applied for the positions of Treasurer and Deputy Treasurer of the City in 1988, she was the Accounting Supervisor-Revenue in the City's Telephone Department.

The City awarded both the jobs of Treasurer and Deputy Treasurer to men, prompting Ms. Potocnik to complain that the employer had violated her right under the *Human Rights Code* (Section 5) to equal treatment with respect to employment without discrimination because of sex. In addition to alleging direct discrimination in the awarding of both jobs, the complaint also cited what is now Section 11 of the *Human Rights Code*, which prohibits constructive discrimination, for example, where a rule or qualification exists that is not on its face discriminatory but which results in the exclusion or restriction of women or other groups.

### The Hearing and Interim Decisions

This case took 30 hearing days over the course of about a year. I have issued three Interim Decisions, which I will describe briefly as background to this ruling.

In a decision dated October 27, 1995, I ordered the disclosure by the City of Thunder Bay of documents related to numerous job competitions between 1983 and 1994. I ruled that they were relevant to the allegation of constructive discrimination. As a result, the hearing became a broad inquiry into the City's hiring practices and whether those practices constituted constructive or systemic discrimination against women. The Commission filed approximately 2,000 pages of the

disclosed documents as exhibits in the hearing, and called 15 witnesses to testify over a period of 22 hearing days.

At the close of the Commission's case, the City moved that the complaint be dismissed for lack of evidence, and asked that I hear the motion without the City having to elect immediately whether to call evidence. In a decision dated June 5, 1996, I ruled I would hear the motion to dismiss without requiring the City to elect whether to call evidence.

After hearing the motion to dismiss, I ruled, in a decision dated August 30, 1996, that there was not enough evidence of constructive discrimination to require an answer by the City. I therefore dismissed the portion of the complaint arising from Section 11 of the *Human Rights Code*. I also ruled that the Commission had not presented enough evidence to continue the hearing on the issue of direct discrimination in awarding of the Treasurer's job, and dismissed that portion of the complaint. With respect to the Deputy Treasurer's job, I ruled that the Commission had adduced enough evidence to require a response by the City.

As a result, the only issue left was whether there had been direct discrimination in the awarding of the Deputy Treasurer's job in 1988. After my ruling the City presented its case with three witnesses, and the decision below deals only with the circumstances surrounding the awarding of the Deputy Treasurer job to William Young instead of Dena Potocnik.

### The Deputy Treasurer Job Competition

In early 1988, Thunder Bay's long-time Treasurer retired, and the position was posted internally and advertised externally. The position is at the highest level of the municipal public service, reporting to City Council and the Chief Administrative Officer. Ms. Potocnik was one of the applicants. However, despite inviting applicants, the City conducted no interviews and simply appointed Paul Milligan as Treasurer. Mr. Milligan had been Deputy Treasurer for more than 15 years. As mentioned above, Ms. Potocnik complained that the City's denial of this position to

her violated the *Human Rights Code* but my August 30, 1996 ruling dismissed that portion of the complaint.

Mr. Milligan's appointment created a vacancy for Deputy Treasurer, which was then posted and advertised in the summer of 1988. There were 11 applicants, including four internal candidates and two women. Six applicants, including both women, were selected for interviews. The interviewers were Mr. Milligan and Barbara Mason, who at the time worked in the City's personnel and labour relations department as Employment Services Coordinator.

The job description for the Deputy Treasurer outlines 19 major tasks for the position, with an obviously high level of responsibility. The duties include directing the day-to-day activities of the City's Finance and Accounting section, hiring staff, coordinating the preparation of financial statements and monthly budget reports to Council, liaison with auditors, and filling in when the Treasurer is absent. Required qualifications are listed as "a university degree in business administration or commerce, and/or a professional accounting designation, together with five years experience in municipal finance management."

Documentary evidence showed that Mr. Milligan and Ms. Mason interviewed the six candidates using a written list of questions. Each interviewer scored each candidate on the following factors: education (maximum 12 points); experience (maximum 10 points); other qualifications, including communications skills during the interview, and computerization (maximum eight points); leadership (maximum five points); alertness to interview questions (maximum two points); and personal suitability for this job (maximum three points). A perfect score would be 40 points.

The candidate with the highest score was a male external candidate, Scott Potts. He was given 36 points by Ms. Mason and 34.5 by Mr. Milligan. However, Mr. Potts was not given a second interview. Instead, the interviewers decided to narrow down the choice to the two top internal candidates, Ms. Potocnik and Mr. Young. Mr. Young had been given 33 points by each of the

interviewers, and Ms. Potocnik had received 34 points from Ms. Mason and 32.5 from Mr. Milligan.

At the time, Mr. Young was the City's Capital and Revenue Control Supervisor, reporting directly to the Deputy Treasurer (Mr. Milligan) and filling in when the Deputy Treasurer was absent. He had held that position since being hired by the City 8 1/2 years earlier. He had no university degree but had an accounting designation (Certified General Accountant.) Ms. Potocnik had been Accounting Supervisor-Revenue in the Telephone Department for two years. Prior to that, she had been an Inventory Clerk (a non-management job) for two years, after working as a temporary employee in three non-management financial positions with the City. She held a Bachelor of Business Administration and her Chartered Accountancy designation. During her articling years in a chartered accountant firm, she had worked on the audit of the City of Thunder Bay's financial statements, as well as audits of other municipalities in Northwestern Ontario.

Even though two interviewers were involved in the Deputy Treasurer job competition, it was understood all along that, in accordance with the City's practice, the final decision would rest with Mr. Milligan as the person who had the expertise to assess the candidates' technical skills and the person to whom the successful candidate would report. Faced with two candidates whose scores were almost equal, Mr. Milligan decided to call back Ms. Potocnik and Mr. Young for a second interview, which was again conducted by him and Ms. Mason, this time using a different set of questions.

Notes of both interviews reveal nothing unexpected or out of the ordinary about the questions or the answers. Ms. Mason testified that she felt both of the candidates were equal but that she was leaning toward Ms. Potocnik as the best choice. Mr. Milligan, she said, was "wrestling" with the decision, but ended up choosing Mr. Young.

At the time of the competition, the City had an Employment Equity policy, which, among other things, stated that "the Corporation will hire and promote on the basis of qualifications, merit and

ability" and that "where the two final candidates in competition for employment or advancement in union or non-union positions are equal, the individual who is representative of one of the specified target groups should be hired." One of the specified target groups is women. Mr. Young was not a member of any of the target groups.

### The Candidates' Qualifications

Even though Ms. Potocnik was clearly treated as a serious candidate for the Deputy Treasurer position, the City argued at the hearing that she was not qualified for the position and that there could be no issue of discrimination since she did not even meet the requirements of the job. The City bases its argument on the requirement of five years of municipal financial management experience, saying Ms. Potocnik could rely only on the two years as Accounting Supervisor. Ms. Potocnik relies on her three articling years during which she performed audit work, assessing and overseeing the City's preparation of financial statements. In my view, counting articling experience with an accounting firm is overextending the definition of municipal financial management. However, as I outlined in my interim decision of August 30, 1996 (at page 20), there were many instances during the period between 1983 and 1994 when the City took a loose view of the stated requirements when hiring and promoting. The City apparently felt that numerous people who did not meet the strict requirements were nevertheless qualified for the positions. Based on this history, the strongest evidence that Ms. Potocnik was qualified for the Deputy Treasurer's job is the fact that she was treated as a serious candidate. I therefore reject the argument that Ms. Potocnik was not qualified for the job.

There is no dispute that Mr. Young met the qualifications as stated in the job posting.

### Witnesses' Testimony

Ms. Potocnik testified that she felt she was better qualified than Mr. Young and that the point-scoring on the first interview was unfair to her. She cited her CA designation, earned after a more

difficult and rigorous programme than Mr. Young's CGA designation. Each was given 10 points out of 10 for having an accounting designation. Mr. Young was given eight out of 10 points by both interviewers under the category of five years municipal finance and accounting experience, while Ms. Potocnik was given five points by Ms. Mason and four by Mr. Milligan. Given my comments above, I do not agree that this was an unfair assessment. On other categories, the candidates were rated equally, except that Ms. Potocnik outscored Mr. Young on communications skills during the interview and alertness to interview questions, and was given two points for her university degree.

Mr. Milligan was present through the entire hearing as the City's advisor, and gave evidence twice, once as a witness called by the Commission, and once as a witness for the City.

Mr. Milligan testified that immediately after being appointed Treasurer, he was required to fill his own former position of Deputy Treasurer. He described the choice as "one of the most important decisions I was going to make." After the first interviews, Mr. Milligan said he wanted some further assessment of the main contenders. Second interviews were not a common practice in the City's hiring. Even though Mr. Potts scored highest in the first interview, he was not called for a second interview, Mr. Milligan said, because "we had two serious internal candidates" and "he [Mr. Potts] didn't score head and shoulders above everyone."

Mr. Milligan knew both final candidates well. Mr. Young had reported to him for more than eight years and they worked in close proximity. Mr. Milligan had hired Ms. Potocnik as his temporary assistant in 1984, and Ms. Potocnik had reported to him in her first permanent job, as inventory clerk, from 1984 to 1986. As Accounting Supervisor-Revenue, Ms. Potocnik also had regular contact with Mr. Milligan. Throughout his testimony, Mr. Milligan had nothing negative to say about Ms. Potocnik's work, and in fact described her as a good employee.

Mr. Milligan described the point allocation in the first interview as only a guideline. A candidate's point score isn't the only consideration in making a choice, he said. The second

interview, in which there was no scoring, enabled him to ensure that he had the best candidate, he said.

After the second interview, Mr. Milligan said, he took several days to think about it and decided on Mr. Young. He testified that the key factor favouring Mr. Young was his work experience. The two candidates were not equally qualified when he finally assessed them after the second interview, he said. Mr. Young met the educational requirements and in addition had more municipal experience than Ms. Potocnik, he said, and so Mr. Young was the superior candidate. Several times, he stated that at no point in the process did he form the opinion that the two final candidates were equal. He recalled discussing the City's employment equity policy with Ms. Mason and others during the process, but said it was not an issue since the candidates were not equal and the policy called for choosing a member of a target group only when the candidates are equal. The sex of either candidate did not enter in any way into the decision, Mr. Milligan testified, nor was there any concern that his supervisors would be upset if he picked a woman for the job. On cross-examination by the Commission, Mr. Milligan agreed that one aspect of hiring is to find someone who will fit in with the corporation and not create conflict, and that the majority of people in financial management positions with the City at the time were men. But he added that he would hire a woman if she was the best candidate even if the other top managers were opposed to hiring a woman.

Ms. Mason, the other half of the interview team, worked for the City for 13 years until 1991 and left on good terms. As employment services coordinator in the personnel and labour relations department, she was involved in numerous interviews, and testified that Mr. Milligan asked her to be present for the Deputy Treasurer interviews. She and Mr. Milligan both agreed that with two internal candidates whom she described as excellent, there was no need to consider Mr. Potts even though he scored highest. She said Mr. Milligan came up with the questions for the second interviews and he did all the talking. She said she was leaning toward choosing Ms. Potocnik but that Mr. Milligan was having a difficult time deciding.

At one point after the second interviews, Ms. Mason said, she talked to the City's personnel and labour relations manager, O.N. Anttila, about the situation. She said she and Mr. Anttila "pointed out to Paul Milligan that there was an employment equity policy and Ollie (Mr. Anttila) and I felt this was a case where we could apply the policy because there were two equally qualified candidates." She added: "These two candidates were the most equally qualified candidates I had ever come across in my employment with the City." But in the end, it was Mr. Milligan's call, and he went with Mr. Young. She said she never got any indication that Mr. Milligan did not want a woman in the job, or wanted a man. Mr. Anttila was not called to testify at the hearing.

When it was suggested to her that Mr. Milligan felt Mr. Young was the better candidate, Ms. Mason disagreed, saying she believed Mr. Milligan thought the two were equal, because he took so long to decide.

I found Ms. Mason to be a credible witness who would have no interest in distorting the facts. She did not hesitate to describe some of the difficulties she said she encountered as a woman employed in a senior position with the City, but at the same time, when asked whether gender was an issue in hiring or promotion at the City, replied that "the general atmosphere was to hire the best person for the job wherever possible." The difficulties she experienced involved feeling that women were excluded from informal morning meetings of men in her department; that women in her department were allocated smaller and less private office space than were men; and that she had experienced sexist attitudes from some politicians. None of these concerns involved Mr. Milligan.

Another key witness was Christine Bates, who was hired by Ms. Mason in 1985 as employment equity officer and who is currently manager of compensation and benefits for the City. Ms. Bates drafted the City's employment equity policy, although City Council changed it to read that target group members "should be hired" rather than "must be hired" when candidates are equal. She said that to her knowledge the only time the policy has become an issue in a hiring or promotion

decision was with regard to the Deputy Treasurer competition between Ms. Potocnik and Mr. Young. Ms. Bates testified that she was and still is a backer of employment equity.

Ms. Potocnik, who already had concerns about the status of women at the City, had developed a working relationship with Ms. Bates, whom she considered an ally. Ms. Bates had helped her with her resume and coached her on interview questions. After being refused the Treasurer and Deputy Treasurer jobs, Ms. Potocnik asked Ms. Bates for an explanation and submitted detailed written questions about the hiring process. As part of her written response Ms. Bates said the following:

"In the case of the vacancy for Deputy Treasurer I believe that initially an effort was made to review and consider all possible options. However when the final choice was made, the employment equity policy was ignored and the historical (or systemic) influences were triumphant.

The notions of 'already doing the work', and 'natural job progression', tied to perceptions of professional designations and relevant experience are difficult to deal with. This is not a case of overt discrimination based on gender, but rather an issue of systemic discrimination. (historical practice)."

Ms. Bates is now distancing herself from those comments, saying they were written in some anger and frustration. This was not the first time Ms. Potocnik had asked questions about a hiring decision, and Ms. Bates said Ms. Potocnik was insistent that all questions be answered within a short time frame. No sooner would Ms. Bates reply than more questions would arrive. "This was not a pleasant exercise for me and I resented doing it, but in the end I did it because I felt I owed her an attempt to answer these questions," she testified. She said the passage quoted above was intended to convey to Ms. Potocnik that she herself did not think there was any discrimination involved but that if Ms. Potocnik thought so, she should stop asking questions and go the Human Rights Commission. "I remember a phone call with Dena; I said I can't do this any more. If you think it's systemic, take it to the Human Rights Commission; I'm out of the loop,"

Ms. Bates said. She said her main message to Ms. Potocnik was that a person in the "acting" position – like Mr. Young – is usually going to get the promotion, and in the minds of many interviewers, experience is often worth more than a degree.

With respect to her statement that the employment equity policy was ignored in the hiring of Mr. Young as Deputy Treasurer, Ms. Bates testified that that was her opinion at the time. She said Ms. Mason had shown her the results of the interviews and asked whether the employment equity policy applied. "I talked to Paul and told him that if two scores are relatively equal, the policy says choose the target group," she said. However, she said she had never gone into any details with either of the interviewers about the qualifications of the candidates, and made her statements assuming the two finalists were equal.

Ms. Bates said in her opinion Mr. Potts should have been hired since he scored highest and she believes there is an advantage to hiring externally even if external candidates are even only slightly superior to internal applicants.

Mr. Young testified briefly, saying he did not feel that as a man he had any advantage in the interviews, and that Mr. Milligan, having worked very closely with him, knew both his strong points and his weak points. He said he was never told beforehand that he had any guarantee of getting the job or inside track in the competition.

### Legal Issues

The legal context of this portion of the case is straightforward. Section 5 (1) of the *Human Rights Code* states:

Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or handicap.

I have already ruled (decision dated August 30, 1996) that the Commission has put forward enough evidence to establish a *prima facie* case of discrimination in the hiring of the Deputy Treasurer. In other words, there is enough evidence, which if believed, can support a finding of discrimination, and the City must provide an explanation for its actions. The City's explanation is simply that Mr. Young was hired over Ms. Potocnik because of his greater experience as a municipal financial manager. It is open to me to find that this is just a pretext, or cover, for the real reason that this decision was made.

The case law is clear that the prohibited ground of decision-making need only be one of many factors involved in a hiring or promotion for there to be a violation of the *Human Rights Code*. (See for example *Almeida v. Chubb Fire Security Division* (1984) 5 CHRR D/2104.) Nor is proof of any intention to discriminate necessary to support a finding that the *Human Rights Code* has been violated. (See *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears* (1985) 7 CHRR D/3102).

This is one of the many cases where there is no direct evidence of discrimination. No one involved in the promotion of Mr. Young to Deputy Treasurer has said that Mr. Young's sex or Ms. Potocnik's was a factor in the decision. In fact, the evidence from the decision-makers is quite the opposite. This requires me to look at circumstantial evidence in order to assess whether the City's explanation rings true or whether it appears to be a cover for a type of decision-making prohibited by the *Human Rights Code*. The circumstantial evidence includes not only the context in which the Deputy Treasurer hiring competition was conducted, but also the voluminous evidence related to the many job competitions between 1983 and 1994, some of which is discussed in my decision of August 30, 1996.

### Conclusions

The Commission argues that Ms. Potocnik was clearly the most qualified of the candidates. It relies on her superior educational qualifications and also her experience as an auditor with a

chartered accountancy firm, as well as her business background and employment history with the City. There is obviously a major subjective element in assessing candidates, even when this is done through an elaborate point system, as is the case here. Having examined the scoring of all the candidates by Mr. Milligan and Ms. Mason, I find that the points allotted are well within reason and not tainted by any discriminatory influences. I do not accept Ms. Potocnik's categorical statement that she clearly had better qualifications for the job than did Mr. Young. I might add that even if Ms. Potocnik were more qualified by all objective measures, the City does not violate the *Human Rights Code* merely by assessing qualifications wrongly, unless its incorrect assessment results from factors prohibited by the *Human Rights Code*.

On the other hand, I find it difficult to accept Mr. Milligan's assertion that he never regarded Mr. Young and Ms. Potocnik as equal candidates. His answers on that issue appeared rather convenient. It may be that Mr. Milligan has come to believe after the fact that the two candidates were not equal, but his actions at the time - for example, in scoring them almost equally, in calling for a second interview, and in agonizing over the decision - plus the evidence of Ms. Mason, indicate that he really did regard them as very close contenders.

Assuming the candidates were equal, this means that the employment equity policy was not followed. It is important to note that the City has no legal obligation to follow its own policies. However, this is the aspect of the case which I find most troubling: Why would Mr. Milligan, knowing the policy, choose to bypass it when faced with two candidates who were so close in qualifications? This failure to follow the policy points to a possible discriminatory influence in the decision-making.

Weighed against that are a number of surrounding facts indicating that discrimination was not part of Mr. Milligan's reasoning and that in the end he simply differentiated the candidates by concluding that Mr. Young's municipal experience, including filling in for the Deputy Treasurer, was of more value than Ms. Potocnik's superior academic credentials and auditing experience.

One of the surrounding facts suggesting that improper considerations were not used is the very fact that Ms. Potocnik progressed as far as she did in the competition. The City could have decided to apply the strict terms of the job description and not even have given Ms. Potocnik an interview because she did not have the required five years of municipal finance management. Not only was she interviewed, but she advanced to the second interview stage, and was clearly considered a serious candidate.

In addition, Mr. Milligan brought Ms. Mason into the process. She is a woman who had shown some interest in employment equity and the status of women at the City. Asking her to be involved does not appear to be an action by someone who had a problem with hiring a woman. Together, Mr. Milligan and Ms. Mason struck Mr. Potts off the list of candidates, even though he scored highest, indicating not only a preference for internal applicants, but also a preference for experience over paper credentials. It is not surprising that Mr. Milligan might value experience over education, since that is how his career has progressed: he has only a high school education and an unsuccessful attempt to pass his CA exams after articling for six years at a chartered accountancy firm, and he worked as Deputy Treasurer for more than 15 years before being promoted to Treasurer. Mr. Milligan's scoring tends to support the inference that he thought Ms. Potocnik performed well in the interview but was lacking in experience.

I also find it significant that in all the evidence I heard, covering events over a 12-year period, I heard nothing indicating Mr. Milligan had any discriminatory attitudes toward women. Had there been sexist comments or actions, I expect I would have heard about them, but there was no such evidence at all. Moreover, Mr. Milligan's hiring record, although not thoroughly canvassed, shows that he has been involved in the hiring of numerous women, some to senior positions. For example, in 1994, he hired Catherine Peterson for the senior position of Manager-Revenue. Ms. Peterson did not meet the strict educational requirements for the job but had extensive experience with the City. She was hired over a man who was also an internal candidate and who had a CA designation but not as much experience as Ms. Peterson.

In the end, it is the City's responsibility to show, on the balance of probabilities, that its decision was not tainted by discrimination. The Commission has attempted to show that the City's explanation, namely Mr. Milligan's reliance on Mr. Young's experience, is a pretext for other, prohibited, reasons. While some doubts have been raised in my mind about the real reasons for hiring Mr. Young, those doubts are not sufficient for me to say that, on the balance of probabilities, the City's decision was made for improper reasons.

My conclusion is that Mr. Milligan likely adopted the safe course in choosing Mr. Young, the person who had worked directly below him and who he knew could do the job. This cautious choice is perhaps not surprising from someone who was making his first major decision after being appointed Treasurer. Others may have given Ms. Potocnik the job – certainly Ms. Mason would have. It is not the role of this Board to declare whether the City made a wise choice, but only whether it made its choice using factors prohibited by the *Human Rights Code*. Had the City really desired to make increased promotion for women a priority, or had it taken its own employment equity policy more seriously than it evidently did, Ms. Potocnik would have received the promotion. But there was no legal obligation to assist women with any kind of affirmative action, only an obligation not to treat women any worse than men. Ms. Potocnik and others in her situation might benefit from legislated employment equity, but that is not part of the current employment law regime. The *Human Rights Code*, with its burden of proof and lengthy, adversarial procedures, is more appropriate as a shield to protect against discriminatory actions than as a sword to promote the advancement of groups that have been historically disadvantaged.

For the above reasons, the complaint is dismissed.

## Costs

The City reserved the right to argue for payment of costs pursuant to Section 41 (4) of the *Human Rights Code* in the event that the complaint was dismissed. Should the City wish to pursue that issue, it should advise the Registrar within 30 days of the date of this decision.

Dated at Toronto this 7<sup>th</sup> day of February, 1997.

A handwritten signature in black ink, appearing to read "Lorne Slotnick".

Lorne Slotnick  
Board of Inquiry

